

No. 14,965

IN THE

United States Court of Appeals
For the Ninth Circuit

WARREN C. GRAHAM and AGNES B.
GRAHAM, His Wife, and CATHERINE
YOUNG COBB,

Appellants,

VS.

UNITED STATES OF AMERICA, STATE OF
CALIFORNIA, CITY OF OAKLAND and
COUNTY OF ALAMEDA,

Appellees.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

OPINION BELOW.

No opinion was rendered by the District Court. Its findings of fact and conclusions of law (R. 50-64) are unreported.

JURISDICTION.

This is a foreclosure suit brought by the United States against Warren C. Graham, Agnes Graham and

Catherine Young Cobb, all appellants here. The State of California, the County of Alameda, the City of Oakland, California, and the State Board of Equalization were also named defendants along with certain other persons who need not be considered here. The complaint, which was filed by the United States on January 2, 1952, alleged that Warren C. Graham and Agnes Graham owed income tax and federal withholding taxes, penalties and interest for 1945 and 1946, and also owed income and excess profits taxes for 1942 as transferee of the Kincaid Company; that the United States has prior and paramount liens upon property belonging to the Grahams and prayed that the District Court decree a sale of such property and distribute proceeds in accordance with its findings as to the interest of the United States. (R. 3-22.) This complaint was amended three times, primarily to correct dates and amounts involved and to otherwise conform to the proof, but in the second amendment Frank Hansen was also named as a defendant, and it was alleged therein that one piece of residential property was conveyed to him, and subsequently by him to Catherine Young Cobb, to defraud the Government in collecting taxes and it was prayed that such conveyances be set aside. (R. 21-22, 29-32, 43-47.) Answers were filed to the complaint and to the amendments thereto. (R. 22-29, 32-33.) Jurisdiction was conferred on the District Court by Section 3678 of the Internal Revenue Code of 1939. Judgment was entered by the District Court on September 14, 1955 (R. 65-68), and a decree of foreclosure and order of sale were also filed the same day (R. 68-72). Notice of

appeal was filed on October 14, 1955, and an amended notice of appeal was also filed on October 26, 1955. (R. 73-74.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED.

1. Whether the assessment for 1942 income and excess profits taxes made against Warren and Agnes Graham, as transferees of the Kincaid Company, was valid.

2. Whether the District Court erred in finding that the conveyance by Mr. and Mrs. Graham of their residence to Frank Hansen and his subsequent transfer to Catherine Young Cobb were shams, made for the purpose of defeating the tax liens, and did not prevent the federal tax liens attaching thereto.

3. Whether this suit is timely insofar as it involves the 1942 taxes assessed against the Grahams as transferees. This depends on whether the collection waivers were obtained from the Grahams under duress and must be given no effect as appellants contend.

STATUTE INVOLVED.

The pertinent provisions of the statute involved are set forth in the Appendix, *infra*.

STATEMENT.

The facts as found by the District Court (R. 50-60) may be summarized as follows:

This is an action to foreclose the federal tax liens which arose as a result of the assessment of taxes against Warren C. Graham and his wife, Agnes B. Graham, of Oakland, California, as set out herein. (R. 50.)

On March 26, 1945, the Collector of Internal Revenue for the Second District of New York received the assessment list carrying assessments of 1942 income and excess profits taxes against Warren C. Graham, as transferee of the Kincaid Company, in the amount of \$16,656.37, and the following day notice and demand was served on him. On May 2, 1946, this assessed tax liability was transferred to the Collector in San Francisco and, on May 9, 1946, the Collector in San Francisco placed this liability on his current tax list. On August 10, 1946, the Collector in San Francisco caused a notice of tax lien in the amount of \$16,656.37 to be recorded by the County Recorder of Alameda County. When this case was heard the outstanding balance of this assessed and recorded tax liability was \$8,068.86 exclusive of interest from the date of notice and demand. (R. 50-51.)

On May 14, 1945, the Collector of Internal Revenue for the Second District in New York received the assessment list carrying assessments of 1942 income and excess profits tax liabilities against Agnes B. Graham, as transferee of Kincaid Company, in the amount of \$16,773.02. On May 21, 1945, a notice and

demand for payment was served on her, but previously on May 2nd, these assessed tax liabilities were transferred to the Collector in San Francisco and they were placed on his current tax list on May 9th. On August 10, 1946, the Collector in San Francisco caused a notice of tax lien in the amount of \$16,773.02 to be recorded by the County Recorder of Alameda County, and that was the outstanding balance when this case was tried. (R. 51-52.)

The Commissioner of Internal Revenue in December of 1946 assessed withholding and federal insurance contributions taxes, penalties and interest for the four quarters of the calendar year 1945 and the first three quarters of the calendar year 1946 in the aggregate amount of \$542,706.95 against Warren C. Graham and Agnes B. Graham, doing business as Graham Ship Repair Company. On December 6, 1946, the Collector of Internal Revenue in San Francisco received a telegraphic jeopardy assessment list carrying these assessments. On December 9, 1946, the Collector served a notice and demand for payment; and, on the same day, caused a notice of lien covering these taxes to be recorded by the County Recorder of the County of Alameda. The outstanding balance of this tax liability was \$365,040.50, exclusive of interest on the sum of \$337,918.01 from the date of notice and demand, when the case was heard. (R. 52.)

The Commissioner of Internal Revenue in July of 1949 assessed federal income taxes for the years 1945 and 1946 against Warren C. Graham and Agnes B. Graham in the amount of \$1,139,375.86. On August 1,

1949, the Collector in San Francisco received the assessment list carrying that assessment and, on August 1, 1949, and on September 2, 1949, the Collector served notices and demands on them for payment of this liability. On December 12, 1949, the Collector caused a notice of tax lien in the amount of \$1,139,375.68 to be recorded by the County Recorder of Alameda County and that amount was unpaid when this case came to trial. (R. 53.)

The above-described federal tax liabilities are asserted as liens against the interests of Warren C. Graham and Agnes B. Graham in the property which is fully described in the findings (R. 53-55) but is generally referred to as the residence at 6035 Wood Drive, Oakland, California.

This property is subject to a reserve for public utilities, five feet in width and running across the length of the property, which reserve was granted to the City of Oakland. (R. 55.)

Mr. and Mrs. Graham do not claim any present interest in the above property and they deny having any interest therein when the federal tax liabilities arose. (R. 55.)

Legal title to this property is in the name of Catherine Young Cobb who was living in Oakland with her husband when this action was commenced. A deed transferring this property from Frank Hansen, a single man, to Catherine Young Cobb, a married woman, was recorded in Alameda County on May 28, 1948. Also a deed transferring this property from

Warren C. and Agnes B. Graham, his wife, to Frank Hansen, a single man, was recorded in Alameda County on December 7, 1946, and a deed transferring this property from Carroll McKee and Opal Leota McKee, his wife to Warren C. Graham and Agnes B. Graham was recorded on October 16, 1945.¹ (R. 55-56).

The conveyance of this property from the Grahams to Frank Hansen was a sham and for the purpose of avoiding and defeating federal tax liens. The Grahams did not intend to divest themselves of the beneficial interest in the property and Frank Hansen did not intend to take the beneficial interest but received the title to the property and held it for the Grahams. (R. 56.)

Frank Hansen (who was made a defendant under the second amended complaint) was employed by the Graham Ship Repair Company and in the years 1945 through 1948 was closely associated with Graham. Other property owned by Graham had been transferred to Hansen and in previous court proceedings these transfers had been set aside. Frank Hansen's deposition was taken and was received in evidence along with various other exhibits. The deposition shows in regard to the conveyance of the property here that the purpose of the transfer to Hansen was to avoid federal tax liens. (R. 56-57.)

The District Court found that the conveyance of such property by Hansen to Catherine Young Cobb

¹The record gives 1946 but Exhibit 9 from which that information is taken shows 1945.

was a sham and made to conceal the Grahams' interest herein, and in any event such transfer was no more than a gift. (R. 57.)

The District Court also made findings as to liens of the State of California, Alameda County and the City of Oakland (R. 57-60), but these are not involved in this appeal.

Upon the basis of the above facts, the District Court made the following conclusions of law:

The liens of the United States arising out of assessments made against Warren C. Graham and Agnes B. Graham for 1942 income and excess profits taxes, for 1945 and 1946 withholding and insurance contribution taxes, and 1945 and 1946 income taxes arose when the Collector received the various assessment lists covering such assessments on March 26, 1945, May 14, 1945, December 6, 1946, and August 1, 1949, respectively. When these liens arose they attached to all property and rights in property owned by the Grahams and to all of their after-acquired property and were good against all persons except mortgagees, pledgees, purchasers and judgment creditors. None of the claimants here comes within these four categories and, in any event, the liens of the United States, which arose in 1945 and 1946, were recorded before the property here was deeded to Catherine Young Cobb and thereafter such liens were good even against the four classes named. (R. 61.)

The federal tax liens that arose on March 26, 1945, and May 14, 1945, attached to the property here in-

volved when that property, by deed recorded October 16, 1945, was acquired by Warren C. Graham and Agnes B. Graham. The federal tax liens of December 6, 1946, and August 1, 1949, attached to this particular property when they arose. (R. 61-62.)

The United States of America, the State of California, the County of Alameda and the City of Oakland are entitled to judgments on their liens in the following order which shall constitute the priority of the liens (R. 62):

(a) In favor of the United States against defendant Warren C. Graham in the sum of \$8,068.86, plus interest at six per cent per annum from March 26, 1945, until paid;

(b) In favor of the United States against defendant Agnes B. Graham in the sum of \$16,773.02, plus interest at six per cent per annum from May 14, 1945, until paid;

(c) In favor of the United States against defendants Warren C. Graham and Agnes B. Graham in the sum of \$365,040.50, plus interest at six per cent per annum on the sum of \$337,918.01 from December 1, 1946, until paid.²

The conveyance from the Grahams to Frank Hansen and the conveyance from the latter to Catherine Young Cobb were complete shams and were frauds on the creditors of Warren C. Graham and Agnes B.

²After the above items were given priority, the District Court then set out (R. 62-63) the order in which other claims could be allowed but due to the size of those allowed the United States we need not consider them here.

Graham. These conveyances are set aside and the property here involved is to be sold by the United States Marshal for the Northern District of California free and clear of these conveyances and any other encumbrances except the reservation for public utilities granted to the City of Oakland. The proceeds of this sale, after deducting the Marshal's costs and commission, are to be applied in payment of the lien claims in accordance with their respective priorities as set out above. Any amounts so paid will be credited against the above judgments. (R. 63-64.)

Judgment in accordance with the District Court's conclusions of law was entered on September 14, 1955, and on the same day a decree of foreclosure and order of sale were also entered. (R. 65-72.) Upon application of the United States for leave to correct an oversight and omission in the decree of foreclosure and order of sale, the District Court ordered on July 2, 1956, that the decree be amended in the manner set forth in the motion.³ (R. 235-236.)

³The Government's motion merely requested that the decree of foreclosure and order of sale previously entered be amended by adding—

It is further ordered, adjudged and decreed that the liens of the County of Alameda are cancelled and all claims of the auditor, assessor and tax collector of said County of Alameda against the subject real property for taxes, penalties, interests and costs insofar as asserted by said County and its said auditor, assessor and collector are set aside, cancelled and released.

SUMMARY OF ARGUMENT.

1. The District Court found that the Oakland residential property involved here was owned by Mr. and Mrs. Graham, two of the appellants here, and was subject to liens which arose as a result of tax assessments against them for several years. It therefore entered a decree foreclosing all of these liens and ordering sale of the property for the purpose of satisfying the Government's tax claims. But, as appellants devote most of their argument to an attack on the 1942 taxes, it is important to note at the outset that, although the District Court ordered those taxes paid first from the sale proceeds, it designated as the next claim to be given priority the claim for withholding and federal insurance contributions taxes for 1945 and 1946 assessed against the Grahams in their individual capacity; and such claim is greatly in excess of the amount realizable from the sale. Thus, even if the claim for 1942 taxes is not upheld here, the Government will be entitled to recover the entire amount of the sale proceeds.

2. In regard to the 1942 taxes assessed against the Grahams as transferees, appellants contend that the assessment was invalid and, in support of such contention, offered to prove (1) that they were not "deed transferees" and (2) that they did not receive the required statutory notice, designated as the 90-day letter. We submit their offer was properly rejected (1) because one may be a transferee within the statute without having received any deed to the distributed assets, and (2) because proof of actual receipt of a

0-day letter is not necessary since the only statutory requirements are that the Commissioner mail such a notice and that he wait 90 days before making an assessment against the person designated as a transferee.

There is nothing here to indicate that the prescribed statutory procedure for making assessments was not followed. Moreover, as the testimony and documentary evidence show that assessments lists carrying the assessment of the 1942 taxes were received by the proper official and notice and demand were then served on both of the Grahams, the statutory requirements for bringing the resulting liens into existence were also met.

In upholding the 1942 tax assessments and the resulting liens, the District Court called attention to the prior suit brought in the Southern District of California to foreclose liens which arose as a result of the same tax assessment against the Grahams and stated that the 1942 tax assessments had been held valid in that suit. The validity of such assessments and resulting liens is also shown in the District Court's findings set out in the record on appeal to this Court and the same record shows that a judgment was allowed the Government for any unpaid taxes remaining after distribution of the proceeds from the sale ordered by the District Court in that suit. In view of the findings and the judgment in that case, we submit that the appellants are not in a position to object to the 1942 tax assessment in this case. Furthermore, although Mr. Graham has paid about half of the 1942

taxes assessed against him, he has never filed a refund claim or taken any steps to have the assessment considered in proceedings allowed by Congress for such purpose.

3. The District Court found that the alleged transfer of the Oakland property by the Grahams to Hansen was a sham and made to defeat the tax liens. Such finding is amply supported by statements of Hansen and a revenue agent showing that the Government was investigating the Grahams' tax matters when the alleged transfers were made and that they were trying to avoid the payment of their taxes. As the Grahams purchased the Oakland property a few months after the 1942 tax assessments were made in 1945 and also held it when the withholding taxes were assessed for 1945 and 1946, on December 6, 1946, it is obvious that the liens arising from such assessment attached to that property and are valid.

The District Court found further that the transfer of the Oakland property by Hansen to Mrs. Cobb, another appellant here, was a sham and made for the same purpose as the transfer to Hansen. But the District Court explained that in any case the transfer could be no more than a gift and as a donee Mrs. Cobb was in no better position than the donor. Thus it is evident that she took subject to the tax liens which came into existence in 1945 and 1946.

4. Appellants also contend that the collection waivers signed by the Grahams were signed under duress and that, if their contention is correct, the waivers can be given no effect and that this suit is

arred, but their contention is not supported by the law or the facts. Although they do not indicate that this point should be limited to the 1942 tax collection, that is necessarily so for the waivers covered only 1942 taxes. Moreover, since the assessments for the other taxes involved here occurred less than six years before this suit was filed, the suit was timely as to those taxes and no waivers were required as to them.

Appellants' assertion that the waivers were given under duress is not supported by the evidence for it shows that they were signed voluntarily and without threats or promise of any reward. Consequently the waivers should be given effect and when that is done it is of course apparent that the suit was also timely as to the 1942 taxes. That was undoubtedly the opinion of the District Court but in view of the issues here it was not required to make any special findings as to the waivers. The rule of procedure relative to findings, to which appellants refer, was made in order that the appellate court, which is not a trier of facts, will always have before it the specific grounds on which the trial court's decision is based. But in this case the District Court did make specific findings and there can be no doubt as to the basis of its decision. Thus there has been sufficient compliance with the rule.

ARGUMENT.

I.

INTRODUCTORY STATEMENT AS TO THE DISTRICT COURT'S
DECREE ORDERING SALE OF THE PROPERTY TO WHICH
TAX LIENS HAD ATTACHED AND DESIGNATING THE
ORDER FOR PAYMENT OF TAX CLAIMS OUT OF THE SALE
PROCEEDS.

This suit was brought by the United States under 1939 Code Section 3678 (Appendix, *infra*) to enforce tax liens which it claimed had arisen as a result of several assessments made against Warren C. Graham and his wife Agnes B. Graham. After the hearing, at which testimony was taken and documentary evidence introduced, the District Court found that the asserted liens were valid and had attached to the Oakland residential property purchased by the Grahams in October 1945. Thus the District Court entered a decree foreclosing all of the federal tax liens. We call attention to these findings and the decree at the outset since appellants' brief is devoted primarily to points bearing on the 1942 income and excess profits taxes assessed against the Grahams as transferees of the Kincaid Company. Certainly, in view of appellants' attack on the 1942 tax claim, it should be noted that, although the District Court gave priority to the liens arising from the assessment of the 1942 taxes and ordered that they be paid first, the next tax claim to which the court gave priority was the claim assessed against the Grahams in their individual capacity for withholding and federal insurance contribution taxes for 1945 and 1946 in the amount of \$365,040 for taxes plus \$190,841.17 for interest. (R. 61-62, 68-70.) As the

claim last referred to is greatly in excess of the amount realizable from the sale of the Oakland property,⁴ it is evident that, even if the 1942 taxes are eliminated, the claim for the years 1945 and 1946 will completely exhaust the fund available for payment. Consequently we maintain that the Federal Government will be entitled to receive the entire amount of the sale proceeds, above costs, even if this court should agree with the appellants' first contention (Br. 15-16) that the transferee assessments against Mr. and Mrs. Graham for 1942 taxes were invalid, and also if this court should agree with the appellants' second contention (Br. 17-19) that this suit was untimely insofar as it involves the 1942 taxes. We do not of course concede the correctness of appellants' contentions and shall indicate in Points II and IV why we think the District Court properly rejected them although we do not consider it necessary that the District Court be sustained on these points in order for the Government to recover here.

As it may not be readily discernible from appellants' argument, we also wish to point out here that the appellants did not question the validity of the assessment of the 1945 and 1946 taxes, referred to above, in the District Court (R. 81-82), nor do they question it here. Thus it appears their only basis for objecting to the foreclosure of the liens arising out

⁴The record does not show what has been or will be received from the sale of the Oakland property but, as Mr. Graham testified (R. 145) that he paid about \$33,000 when it was purchased in October 1945, it is apparent that the sale proceeds are insufficient to pay this tax claim for 1945 and 1946 and the allowable interest thereon.

of the assessments for the years subsequent to 1942 has been that the property involved here was not owned by the Grahams at the time that the assessments were made and when, according to the District Court's findings, valid tax liens attached to such property. That contention is set forth in their third point (Br. 19-22) and was properly rejected by the District Court, as we shall show in our Point III.

II.

THE ASSESSMENT OF THE 1942 INCOME AND EXCESS PROFITS TAXES WHICH WAS MADE AGAINST MR. AND MRS. GRAHAM, AS TRANSFEREES, WAS VALID AND CANNOT BE ATTACKED IN THIS SUIT.

As already indicated, appellants' principal contention here appears to be that the assessment of the 1942 taxes against the Grahams as transferees was invalid. However, there is nothing to indicate any irregularity in the procedure followed by the Commissioner or other internal revenue officers. The record shows that the assessment list carrying the assessment of the 1942 taxes against Mr. Graham as transferee of the Kincaid Company was received on March 26, 1945, and notice and demand for payment was served on him the following day; and the assessment list carrying the assessment of such taxes against Mrs. Graham as transferee was received on May 14, 1945, and notice and demand was served on her May 21, 1945. (R. 50-51.) There is a presumption that the Commissioner, as a public officer, performed his duty in making these assessments. *United States v. Chemical Foundation*, 272 U.S. 1, 14-15; *Austin Co. v. Commissioner*, 35 F.

1910, 912 (C.A. 6th); *Harrington v. Lucas*, 41 F. 2d 29 (C.A.D.C.); see also *Phillips v. Commissioner*, 33 U.S. 589. In view of that presumption such assessments are *prima facie* correct and are customarily given the force of a judgment. *Bull v. United States*, 95 U. S. 247, 260; *Citizens Nat. Trust & S. Bank of Los Angeles v. United States*, 135 F. 2d 527 (C.A. 9th).

Moreover, it is evident from the facts just stated that the two requirements for establishing tax liens were met here. See 1939 Code Sections 3670 and 3671 (Appendix, *infra*). Thus the Government had tax liens, because of these assessments, from the last date indicated above, and that is what the District Court held. (R. 61.) Also such liens not only attached to all property owned by the Grahams when they first came into existence but to any after-acquired property including the Oakland residential property purchased by the Grahams in October 1945. (R. 56, also see Ex. 9.)

In attempting to show otherwise, appellants made an offer of proof which, upon the Government's objection, was properly rejected by the District Court. (R. 188-189.) Such offer of proof was to show (1) that the Grahams were not "deed transferees" and could not for that reason be validly assessed as transferees, and (2) that the Grahams never received any 30-day letter notifying them that they owed taxes as transferees. We submit that the appellants could not help their case by proving that they were not "deed transferees" for the term "transferee" is defined by

1939 Code Section 311 (f) (Appendix, *infra*) as including a distributee and to be a distributee it is not necessary to show either that one has received a deed to any assets or that any formal procedure has been followed.

Appellants' offer to prove that the Grahams never received a 90-day letter also falls short of what is required in order to establish their contention that the transferee assessment was invalid. The Commissioner is required to mail a notice advising the transferee of the tax to be assessed against him in that capacity and is prohibited from making the proposed assessment for a period of 90 days. 1939 Code Sections 272(a) and 311(d) (Appendix, *infra*). But there is no statutory provision or rule of law requiring the Commissioner to prove that the required notice was received by the transferee and appellants have not offered to prove, and doubtless could not prove, that a notice was never mailed to the Grahams.

Not only does it appear from the testimony and the documentary proof introduced in evidence that the prescribed statutory procedure was followed but it is doubtful, as the District Court pointed out at the hearing, whether the Grahams can attack the assessment of 1942 taxes in this suit. In this connection, the District Court indicated that its views were in accord with those expressed in *Commercial Credit Corp. v. Schwartz*, 126 F. Supp. 728 (E.D. Ark.). In that case a creditor, which had commenced a suit to foreclose a real estate mortgage, named the taxpayers, who were the mortgagors, and the United States as defend-

ants; and after the case was removed to the federal court the taxpayers filed a motion asking permission to amend their answer in such a way as to attack the validity of the assessment on which the Government's lien was based. In denying the motion, the District Court stated (pp. 729-730) that the taxpayers were attempting to receive a judicial review of the Commissioner's assessment without first exhausting remedies provided by Congress and that what they were doing amounted to a collateral attack on the assessment which should not be allowed.

The same conclusion could also be reached here, particularly as to Mr. Graham who has paid approximately one-half of the taxes involved in this transferee assessment (R. 51) but has not filed any claim for refund. Furthermore, neither of the Grahams contested the Government's suit to foreclose a tax lien which was attached to property of the Grahams located in San Luis Obispo County and which arose out of the same assessment for 1942. See *United States v. Graham*, 96 F. Supp. 318 (S.D. Cal.), affirmed *sub nom. State of California v. United States*, 195 F. 2d 530 (C.A. 9th), certiorari denied, 344 U.S. 831. During the hearing in the instant case, the District Court referred to this prior suit and stated (R. 189) that the assessment of these 1942 taxes had been held valid although the decision therein did not discuss the point.⁵ However, it will be seen from the record filed

⁵Counsel for appellants admitted at the hearing (R. 189) that it was true that this assessment had been held valid in the prior suit as to Mr. Graham but not as to Mrs. Cobb, who was not a party to that suit.

upon the appeal in the prior suit that there were not only specific findings indicating the validity of the liens arising out of the 1942 tax assessments against the Grahams as transferees, but the District Court entered a decree foreclosing those and other tax liens and not only ordered a sale of the property to which those liens had attached but also stated that the United States could have judgment against the Grahams for any tax claims remaining unpaid after distribution of the proceeds from the sale. (Record on appeal in prior suit, pp. 87-88, 94, 105-111.) We submit that in view of those findings and that judgment, which was entered only about four months before the complaint was filed in the instant suit, the validity of the 1942 tax assessments and the resulting liens had been established and could no longer be questioned when this suit was filed.

Appellants cite a number of cases (Br. 6-13) but none of them involves the actual situation which we have here, and some of them merely state general principles relative to assessments such as in the case of *In re Holdsworth*, 113 F. Supp. 878 (N.J.), where it was held that the creation of a valid lien under Sections 3670 and 3671 was dependent on three conditions, namely, (1) the receipt by the Collector of Internal Revenue of an assessment list certified by the Commissioner, (2) a demand for payment by the Collector, and (3) neglect or refusal of the taxpayer to pay. It is of course apparent from the evidence produced by the Government in this case that these three requirements were met here.

In other cases appellants refer to, such as *Maxwell v. Campbell*, 205 F. 2d 461 (C.A. 5th), and *Ventura v. Consolidated Oil Fields v. Rogan*, 86 F. 2d 149 (C.A. 5th), certiorari denied, 300 U.S. 672, it is apparent that objections based on irregularities in making assessments were not only made timely but were made under circumstances quite different from those here. Thus, in the *Ventura* case, the taxpayer sought an injunction to prevent collection of a tax by distraint and in granting such relief this Court held that the letter which the taxpayer had received from the Treasury Department was not the notice of deficiency required by the statute but also held that, even if it were, the assessment would still be invalid because the evidence showed that it had been made before the expiration of the 60 days, the period during which an assessment was prohibited by the statute then applicable.

It should also be apparent that the appellants' quotations (Br. 14-16) from the House and Senate Committee Reports on 1954 Code Section 7403 (which is the same as 1939 Code Section 3678) do not strengthen their position. Such reports pointed out that it had been proposed in the House to amend the law by providing that the assessment of the tax on which a federal lien is based shall be conclusively presumed to be valid in an action to foreclose a lien but that the proposed amendment had been omitted. In explaining this omission, the reports stated further that the elimination of the proposed provision was not designed to change the effect under existing

law given to the assessment in such adjudication. As conclusive presumptions are not favorably accepted, we can surmise why the proposed provision was omitted but, whatever the reason for its proposal and rejection, the proposal has no effect on this case.

III.

THE DISTRICT COURT CORRECTLY HELD THAT THE ALLEGED TRANSFER OF THE PROPERTY INVOLVED HERE WAS A SHAM AND DID NOT PREVENT THE FEDERAL TAX LIENS FROM ATTACHING THERETO.

As we have just shown, the liens resulting from the assessment of the 1942 taxes arose in 1945, a few months before the Grahams purchased the Oakland residential property involved here, and such liens attached to that property when it was acquired. Realizing this, the appellants have attempted to defeat the foreclosure of the liens for 1942 taxes by contending that they were based on an invalid assessment, and we have just answered that contention. But, as to other liens resulting from the uncontested assessment of taxes for 1945 and 1946, appellants have found another ground for objecting to the foreclosure of such liens and that is that the Grahams had no interest in the Oakland property which the District Court ordered sold to satisfy the Government's liens.

As to the liens for the 1945 and 1946 taxes just referred to, the District Court found that they arose on December 6, 1946 (R. 52, 61), and the appellants agree. (Br. 19.) But they assert that the Grahams

gave the property to Mrs. Cobb, another appellant here, and that this was accomplished by transferring such property to Frank Hansen in trust for Mrs. Cobb under an agreement allegedly executed on August 1, 1946. It is further contended that the deed transferring such property to Hansen was drawn on August 7, 1946, and recorded on December 7, 1946, and that subsequently, on May 28, 1948, Hansen transferred the property to Mrs. Cobb. (Br. 20.) Those contentions are based to some extent on the testimony of Mr. and Mrs. Graham and Mrs. Cobb. (R. 111-112, 126-127, 141-142, 177-183, 192, 196-198.) But it will also be seen that much of their testimony is vague and is in direct conflict with Hansen's testimony which was accepted by the District Court. In rejecting appellants' version of their transactions, the District Court found as to the first transfer that (R. 56)—

8. The conveyance of the above-described real property from Warren C. Graham and Agnes B. Graham to Frank Hansen was a sham. The transfer was for the purpose of avoiding and defeating Federal tax liens. Warren C. Graham and Agnes B. Graham did not intend to divest themselves of the beneficial interest in the property and Frank Hansen did not intend to take the beneficial interest. Frank Hansen received title to the property and held title to the property for Warren C. Graham and Agnes B. Graham.

Thus it is apparent from the District Court's finding that Hansen, who was allegedly holding title to the Oakland property when the 1945 and 1946 tax liens became effective on December 6, 1946, actually

did not take the beneficial interest in such property and it was never intended that he should. This finding is based on Hansen's deposition which, as the court stated (R. 56-57), was received in evidence as an exhibit.⁶ It will be seen that Hansen stated that he was told that Graham wanted him to take this property because "the Internal Revenue was breathing hard down his neck", and in agreeing to do so he understood that he was to have no beneficial interest in the property and that the purpose of such transfer was to avoid federal tax liens. (See pp. 7-10 of Ex. 10, also see R. 57.)

Hansen's testimony was corroborated by a deputy clerk who was in charge of seizures and sales for the Internal Revenue Service and who testified that he was working on the Grahams' tax liabilities in 1946, that he contacted Mr. Graham as early as the first week in August of that year and that subsequently he made several telephone calls to Mr. Graham. (R. 213-214.)

It should also be noted that the Grahams continued to live in the Oakland residence after the alleged conveyance, at least until 1949 or 1950. (R. 125, 202.) Furthermore, when the Grahams conveyed this residence to Hansen they were not solvent for although they estimated their net worth at \$300,000 (R. 113) that did not include the Government's claims for various kinds of taxes for 1942, 1945 and 1946 which with interest was greatly in excess of a million dollars

⁶The deposition is Exhibit 10 and although not contained in the printed record is part of the record on this appeal.

and a large part of these taxes was already a debt owed to the Government by the time of the alleged transfer in August 1946. (R. 51-53, 62-63.) Thus counsel for appellants is in error in stating (Br. 20) that there was no known liability outstanding against the Grahams when they made "their gift" of the residence to Mrs. Cobb.

As to the transfer of the Oakland property to Mrs. Cobb in May 1948, the District Court found (R. 57):

The conveyance of the above-described property from Frank Hansen to Catherine Young Cobb was a sham and made for the same purpose as was the conveyance from the Grahams to Hansen, namely, to conceal the Grahams' interest therein. In any event the transfer to Catherine Young Cobb was no more than a gift.

Appellants object (Br. 19) to this second finding because it was stated in the alternative but we submit that the court's meaning is clear. Thus, while it first found specifically that the conveyance from Hansen to Mrs. Cobb was a sham and was made for the same purpose as the conveyance from the Grahams to Hansen, it then in effect stated that even if the conveyance was treated as a valid transfer it would still be no more than a gift. In other words, long before the alleged conveyance to Mrs. Cobb was executed in May 1948 the Government acquired admittedly valid liens for 1945 and 1946 withholding taxes, as well as liens for the 1942 taxes, and as a donee Mrs. Cobb necessarily took subject to such liens. This cannot be disputed for a donee has never been given a preferred

status like that accorded to mortgagees, pledgees, purchasers or judgment creditors under 1939 Code Section 3672 (Appendix, *infra*), but is in the same position as the donor.

It is apparent, as we have already indicated, that appellants are attempting, even under their third point (Br. 19-22), to show that the principal liens involved here are those arising out of the 1942 tax assessments. Thus they assert (Br. 22) that the District Court's finding relative to the fraudulent character of the transfer "was based on the erroneous assumption that the transferee tax lien for 1942 taxes against the Kincaid Company was valid". But that is obviously not correct for the District Court's finding is dependent in no way on whether the 1942 tax lien was valid. Indeed, as we have pointed out, the Government should prevail here even though the 1942 tax liens are eliminated for the evidence shows that the Government had valid liens for 1945 and 1946 taxes greatly in excess of the sale proceeds and that the alleged transfer of the property to which such liens attached was fraudulent. Moreover, as the District Court held (R. 61), all of these liens were recorded before this property was deeded to Mrs. Cobb and was at the time of such transfer good even against the preferred classes in Section 3672.

IV.

**THE GOVERNMENT IS NOT BARRED FROM COLLECTING
ANY TAX CLAIM INVOLVED IN THIS SUIT.**

The appellants also contend (Br. 17-18) that the collection waivers which were signed by Mr. and Mrs. Graham were signed under duress and assert that, if they are correct, the waivers can be given no effect and this action is barred by the applicable statutory provisions. As the District Court did not make any specific finding as to the waivers, appellants claim further that the District Court was in error in failing to do so. We do not agree with any part of this contention.

In the first place, while appellants make it appear (Br. 18) that if they are correct in their assertion as to the waivers the whole suit would be barred, their contention must be interpreted as being directed only toward the 1942 taxes for the waivers⁷ covered only those taxes. Consequently, even if it should be held that the waivers did fail to extend the time for collecting the 1942 taxes, it is still evident that under Code Section 276 (c) (Appendix, *infra*) this suit is timely as to the other tax claims. That section provides that, where the assessment has been made within the prescribed period of limitation (and all the assessments here were within the statutory period), a suit may be filed (1) within six years after the assessment of the tax or (2) prior to the expiration of any period for

⁷The waiver signed by Mr. Graham was introduced in evidence as Exhibit 4 (R. 92) and that signed by his wife as Exhibit 6-D (R. 101-102). Both of these exhibits, though unprinted, are part of the record in this Court.

collection agreed upon in writing by the Commissioner and the taxpayer. Thus, as this suit was filed on August 17, 1951, and the 1945 and 1946 withholding and federal contributions taxes were assessed about December 6, 1946, the filing date was well within the six-year period so far as those taxes are concerned and no waiver was necessary. That is also true as to the 1945 and 1946 income taxes which were assessed in July 1949. (R. 21, 52-53.) Furthermore, as the waivers covering the 1942 taxes were signed by the Grahams and the Commissioner on November 21, 1950 (R. 92, 102), which was several months before the six-year period for this suit expired (i.e., six years from the 1945 assessment) and the waivers extended the time for collection by suit until December 31, 1951, it is also evident that this suit was timely as to the 1942 taxes unless, as appellants contend, the waivers were obtained under duress; and the evidence does not support that contention.

Although Mrs. Graham testified that the revenue agent who brought her a form of waiver to sign told her that if she would sign the form "it would possibly help him [Mr. Graham] get some papers that were needed at the time for my husband's parole" from McNeil Penitentiary, she refused to sign until she went to see her husband, and she admitted that the agent did not threaten her in any way. (R. 193-195, 201-202.) Subsequently, according to one of the revenue agents who testified, Mrs. Graham signed the waiver in his presence in the San Francisco office in the fall of 1950, and he denied that he had at any

time suggested to her that her husband's parole might be held up if the waivers were not signed. (R. 214-217.)

A revenue agent from the Tacoma revenue office testified that the waiver signed by Mr. Graham was sent direct to that office from the San Francisco office, that he took the waiver to the penitentiary where it was signed by Mr. Graham in his presence on November 21, 1950, as dated, and that he then returned it to San Francisco. (R. 150-154.) His testimony is corroborated by that of the Deputy Clerk in the San Francisco office, who sent the waiver (R. 204-214) but is in direct conflict with that of Mr. Graham who claimed that the waiver was brought to him by Mrs. Graham and that he signed it on February 6, 1951, and mailed it back to San Francisco himself (R. 114-115). However, as these agents had documents with which to refresh their recollection, and were in charge of the records pertaining to the waivers, their testimony should be accepted both as to the timeliness of the waivers and also as to the manner in which they were obtained. Moreover, as the Grahams tried to indicate that his parole was being delayed, it should be noted that a parole report on Mr. Graham was forwarded by the Intelligence Unit of the Internal Revenue Service on May 28, 1951, in about a month after a request for such data was received from the parole executive in Washington, D.C., and that 30 days is the average time for such a report. (R. 220-224.)

We submit that in view of such evidence relative to the waivers the District Court undoubtedly accepted

it as valid and voluntarily given. But it was not required to make special findings as to the waivers.

In attempting to show that the District Court erred in failing to make such findings, appellants cite (Br. 17) Rule 52(a) of the Federal Rules of Civil Procedure which provides that in all actions tried without a jury, the court shall find the facts specially and shall also state separately its conclusions of law thereon. The reason for such rule is of course obvious. As the appellate court is not a trier of fact and cannot substitute its judgment for the trial court, it is necessary that the latter make findings explicit enough to convey a clear understanding of the basis of the decision and to enable the appellate court to determine the ground on which the trial court reached its decision. See *Irish v. United States*, 225 F. 2d 3, 8 (C.A. 9th), and *Maher v. Hendrickson*, 188 F. 2d 700, 702 (C.A. 7th), which hold that the ultimate test as to the propriety of findings is whether they are sufficiently comprehensive to provide a basis for decision and supported by the evidence.

The District Court did find the facts specially here and also made separate conclusions of law (R. 50-61) and its findings meet the test announced in the above cases for they are sufficiently explicit to clearly indicate the basis for its decision. Thus its failure to make a specific finding as to the waivers is not comparable to the situation in the *Irish* case in which this Court said it was unable from what the trial court had found to determine the actual basis for its decision. We do not have that difficulty here for we

know that the District Court has followed the basic requirements of the statutory provisions referred to and has found that the Government not only had valid liens for taxes involved here but had filed a timely suit for the foreclosure of such liens.

CONCLUSION.

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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January, 1957.

(Appendix Follows.)

Appendix.



Appendix

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [as amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to Board of Tax Appeals*.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

* * * * *

(d) *Waiver of Restrictions*.—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(26 U.S.C. 1952 ed., Sec. 275.)

SEC. 276. SAME—EXCEPTIONS.

* * * * *

(c) *Collection After Assessment.*—Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

* * * * *

(26 U.S.C. 1952 ed., Sec. 276.)

SEC. 311. TRANSFERRED ASSETS.

(a) *Method of Collection*.—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees*.—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

* * * * *

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) *Period of Limitation*.—The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) In the case of the liability of an initial transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the taxpayer;

* * * * *

(d) *Suspension of Running of Statute of Limitations*.—The running of the statute of limitations upon

the assessment of the liability of a transferee or fiduciary shall, after the mailing to the transferee or fiduciary of the notice provided for in section 272 (a), be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for sixty days thereafter.

* * * * *

(f) *Definition of "Transferee."*—As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

(26 U.S.C. 1952 ed., Sec. 311.)

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the

liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

* * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

SEC. 3678. CIVIL ACTION TO ENFORCE LIEN ON PROPERTY.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell property and rights to property, whether real or personal, to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the

Commissioner may direct a civil action to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax.

(b) *Parties to Proceedings.*—All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court.

(c) *Adjudication and Decree.*—The said court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property and rights to property in question, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property and rights to property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3678.)